LIBRARY
U. S.

Office-Supreme Court, U.S.
FILED
OCT 9 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 358

BUCKHEAD THEATRE CORPORATION, et al.,
Petitioners,

versus

ATLANTA ENTERPRISES, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

EDWARD S. O'NEILL
900 17th Street, N. W.
Washington, D. C.
SWIFT TYLER
JOHN C. TYLER
Healey Building
Atlanta, Georgia
W. BRADLEY RYAN
BARRY R. McDONOUGH
141 Milk Street
Boston 9, Massachusetts

INDEX

Page

1. Portions of Paramount decrees dealing with run and clearance are admissible in subsequent private suit 1

2. The Paramount decrees are admissible in a subsequent private suit against those parties who were parties to the prior Government action 3

3. The Paramount decrees together with the evidence before the jury warranted submission of Count 1 to the jury 4

4. There is a conflict among the circuits as to the interpretation of this Court's opinion in *Theatre Enterprises* 8

5. The result reached in the instant cases, and the rulings which led up to it, are in conflict with the decisions of this court and the statutory court in the Paramount Case 12

TABLE OF CASES CITED

Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corporation (N.D. Pa.) 168 F. Supp. 553 ..... 3, 12

Bausch Machine Tool Co. v. Aluminum Co. of America, 72 F. 2d. 236 (C.A. 2) 1934, cert. denied 293, U.S. 589 14

Berger v. United States, 295 U.S. 78 6

Columbia Pictures Corp. v. Rubinstein: 1961 C.C.H. Trade Cases (C.A. 8 1961) 2, 4

Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. 2d 951, 958 (2nd Cir. 1951) ..... 4.

TABLE OF CASES (Continued)

Page

Don George, Inc. v. Paramount Pictures, Inc. (D.C. La.) 111 F. Supp. 458 — 5

Eagle Lion Studios v. Loew's, Inc. (C.A. 2, 1957) 248 F. 2d. 438; aff'd by divided court, without opinion, 358, U.S. 102. 3 L.ed. 2d 47 — 10

Homewood Theatre v. Loew's, Inc. 110 F. Supp. 398 — 2, 4

International Shoe Machine Corp. v. United States Shoe Machinery Corp. F. 2d. (first cir. 1963) — 8

Interstate Circuits, Inc., et al. v. Tivoli Realty Co. (N.D. Texas, Dallas Division, 1947) 75 F. Supp. 93 — 11

Loew's, Inc. v. Cinema Amusements, Inc. (C.A. 10) 210 F. 2d. 86 — 5

Martin v. United States, 100 F. 2d. 490 (C.A. 10) — 7

New Amusements v. Knoxtenn Theatres, Inc., (E.D. Tenn. N.D.) Appellants' Brief, Appendix IV p. 143 — 3, 4, 12

Orbo Theatre Corp. v. Loew's, 156 F. Supp. 770 (D.C. 1957) — 7

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d. 721 (10th Cir. 1955) — 4, 7

Park Neponset v. Smith (C.A. 1) 258 F. 2d. 452 (Fifth Circuit 1958) — 8

Sablosky v. Paramount Film Distributing Corp'n E.D. Pa. (137) F. Supp. 929 — 3

TABLE OF CASES (Continued)

Page

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (C.A. 7) 213 F. 2d. 284 5

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, aff'g (C.A. 4) 201 F. 2d. 306 ..... 3, 8

Tivoli Realty, Inc. v. Paramount Pictures, Inc. 209 F. 2d. 41 (Fifth Circuit 1954) 2, 3

Twentieth Century Fox Film Corporation v. Brookside Theatre Corp. (C.A. 8) 194 F. 2d. 846 cert. 2

United States v. Schine, 334 U.S. 117, 130 8

Webster Rosewood Corp'n v. Schine Chain Theatres, Inc. 263 F. 2d. 533 (2nd Cir. 1959) 4, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 358

BUCKHEAD THEATRE CORPORATION, *et al.*,
Petitioners,

versus

ATLANTA ENTERPRISES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

---

1. Portions of Paramount Decrees Dealing with Run and Clearance Are Admissible In Subsequent Private Suit.

The respondents argue on pages 4 and 5 of their response brief that since the Paramount case adjudicated nothing in respect to Atlanta runs and clearances, that portions of the Paramount decree relative to runs and clearances are not admissible in the instant cases. This argument is contrary to both logic and to the reported authorities. According to the theory of the respondents the portions of the Paramount decrees

relative to run and clearance could be admissible in no private anti-trust action under any circumstances, since there was no adjudication in *Paramount* that any particular local system of runs and clearances was illegal.

However, the District Court in the Paramount Case found that those defendants were guilty of conspiring with each other to maintain a nationwide system of runs and clearances which was substantially uniform in each local competitive area. (70 F. Supp. 53, 72) The authorities are clear that when the impact in a particular area of that nationwide system of runs and clearances is shown by a treble damage plaintiff, then the relevant portions of the decrees become admissible in evidence as to the Paramount Case defendants. The following are some of the cases in which the decrees in their entirety or the portions dealing with run or clearance, have been admitted in evidence upon showing of impact in the local competitive area of the system of runs and clearances condemned in the Paramount Case.

Tivoli Realty, Inc. v. Paramount Pictures, Inc. (C.A. 5) 209 F. 2d 41 [Dallas, Texas]

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp. (C.A. 8) 194 F. 2d 846, cert. den. 1952 [Kansas City, Missouri].

Loew's, Inc. v. Cinema Amusements, Inc. (C.A. 10) 210 F. 2d 86 [Denver, Colorado].

Homewood Theatre v. Loew's, Inc. (D. Minn.) 10 F. Supp. 398.

Columbia Pictures Corp. v. Rubenstein, Inc. (C.A. 8, 1961) 1961 CCH Trade Cases, [Minneapolis, Minnesota].

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. 346 U.S. 537 aff'd (C.A. 4) 201 F. 2d 306 [Baltimore, Maryland].

Sablosky v. Paramount Film Distributing Corp'n (E. D. Pa. 137 F. Supp. 929, 934-6) [Norristown, Pennsylvania].

Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp'n. (W.D. Pa.) 168 F. Supp. 553, 559 [Pittsburg, Pennsylvania].

New Amusements v. Knoxtenn Theatres, Inc. (E. D. Tenn. N.D.), [Knoxville, Tennessee].

2. The Paramount Decrees Are Admissible In A Subsequent Private Suit Against Those Parties Who Were Parties To The Prior Government Action.

Respondents argue on page 6 of their response brief that since the exhibitor respondents in these actions were not parties to the Government suit it may be reversible error to admit the decrees in evidence as to these distributor respondents that were parties to the Government suit. However, petitioners have not contended that the Paramount decrees were admissible against the exhibitor-respondents, but only against the distributor respondents. The decrees were offered only against eight distributor respondents who were parties to the Paramount Case. However, in *Tivoli Realty, Inc. v. Paramount Pictures, Inc.* (C.A. 5, 1954) 209 F. 2d. 41 the Fifth Circuit held that the Paramount decrees should have been admitted as to the same 8 distributors who are respondents in these actions, although in the *Tivoli Case* there were two exhibitor defendants, Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc. The following are some other actions in which the

Paramount decrees have been admitted in evidence against distributors who were defendants in the Paramount Case, although there were one or more exhibitor defendants were parties, who had not been parties to the *Paramount Case*: *Columbia Pictures Corp. v. Rubenstein* 1961 C.C.H. Trade Cases. (C.A. 8, 1961); *Homewood Theatre v. Loew's Inc.*, 110 F. Supp. 398; *New Amusements v. Knoxtenn Theatres, Inc.* (E.D. Tenn. N.D.).

Paramount Film Distributing Corp. v. Village Theatre, Inc. 228 F. 2d 721, cited by respondents on page 7 of their response brief, has no bearing here. The complaint in that action did not allege the general conspiracy of Paramount with other distributors to do anything condemned in the Paramount Case, but merely charged a conspiracy between Paramount and United Paramount Theatres and a wholly-owned theatre operating subsidiary. In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, (C.A. 2, 1951) 190 F. 2d 951, cert. den. 342 U.S. 926 1952, cited in respondents response brief, the distributors Columbia and Universal were not parties to the conspiracy alleged, and there was a divergence of conduct on the part of some of the remaining distributors that were defendants.

3. The Paramount Decrees Together With the Evidence Before the Jury Warranted Submission of Count I to the Jury.

Respondents argue on page 8 of their response that even with the decrees in evidence, Count I could not be submitted to the jury, because petitioners had not established a national conspiracy during 1952-61 with evidence independent of the decrees. In *Webster Rose-*

wood, supra, the Second Circuit pointed out that with the Government findings admitted, plaintiff had the burden of showing the continuance of the conspiracy into plaintiff's damage period. Here, petitioners had the same burden.

The Paramount decrees are even admissible in evidence where a plaintiff has alleged damage solely from a local conspiracy in the vicinity of its theatre. *Don George, Inc.* v. *Paramount Pictures, Inc.* (D.C. La.) 111 F. Supp. 458, 468-69. *Loew's Inc.* v. *Cinema Amusements, Inc.* (C.A. 10) 210 F. 2d. 86. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.* (C.A. 7) 213 F. 2d. 284. In the instant cases, however, petitioners could not offer the Paramount decrees and judgments on Count 2, because each complaint alleged in Count 2 a local conspiracy "other than and different from the national conspiracy alleged in the first count" of the complaint (R. 48, 1207).

Neither the Trial Court nor the Fifth Circuit decided whether the Paramount decrees together with the evidence before the jury warranted submission of Count 1 to the jury. However, the language of the Trial Court, indicates that the granting of the motion for directed verdict as to Count 1 was a consequence of the exclusion of the Paramount decrees and judgments. The Trial Court stated:

> "Well, I think it follows the court's ruling with respect to the Paramount decree, that the first count of the complaint would have to go out.
>
> "Now, the Court will dismiss the first count

> of the complaint, but will overrule the motions with respect to the second and third counts of the complaint." (R. 1145)

In the Paramount Case the findings were not based on evidence with regard to every city and town throughout the United States. The Expediting Court heard evidence as to ninety-two cities throughout the nation, and heard somewhat more detailed evidence as to four cities, one of which was Atlanta. Petitioners here, as has already been pointed out, have shown the requisite impact of the Paramount Case in Atlanta not only during the damage period, but prior to 1945 when petitioners' theatres were actually operating. In view of the Congressional intent in enacting Section 5, it is submitted that plaintiff in order to show the continuance of the prima facie conspiracy after 1945, need not offer as detailed evidence of national conspiracy as was offered in the Government case. In none of the reported cases where the decrees have been admitted, did plaintiff offer detailed proof of conspiracy on a national basis. The Petition for Certiorari (pages 31-35) outlines evidence of the continuance of the Paramount conspiracy in the City of Atlanta, the Atlanta exchange area (Georgia, Tennessee and Alabama and elsewhere, after 1945 and during the damage period.) There is certainly no material variance between the pleading and the proof.

In *Berger* v. *United States*, 295 U.S. 78, at 83, this Court stated:

> "In *Washington & G. R. Co.* v. *Hickey*, 166 U.S. 521, 531, 41 L. ed. 1101, 1104, 17 S. Ct. 661, this court said that 'no variance ought ever

> to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' This was said in a civil case, it is true, but it applied equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense [Cases Cited]."

See also *Martin v. United States*, 100 F. 2d. 490, at 496 (C.A. 10).

On page 12 of their response, respondents point out that the Fifth Circuit stated that in these actions the conspiracy declared upon commenced three years later than that before the Supreme Court in *Theatre Enterprises*, 327 F. 2d. 365, 369. However, the Fifth Circuit apparently confused the commencement of petitioners' damage period, with the commencement of the conspiracy declared upon by petitioners. The record is clear that in the instant cases petitioners each alleged a conspiracy commencing period to 1935 (R. 42, 1200), and that the Trial Court, in fact, allowed evidence going back to the early 1940's.

For that same reason *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d. 721 (C.A 10, 1955), and *Orbo Theatre Corporation v. Loew's Incorporated*, 156 F. Supp. 770 (1957), aff'd. 261 F. 2d. 280 (1958), cert. den. 359 U.S. 943 (1959), cited in respondents' response on pages 11 and 12, are not applicable here, since in both those actions the conspira-

cy declared on was alleged to have commenced subsequent to the time period with which the Paramount Case was concerned.

4. There Is A Conflict Among The Circuits As To The Interpretation of this Court's Opinion in Theatre Enterprises.

Respondents contend that there is no conflict among the circuits as to the interpretation of this Court's opinion in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). However, the decision of the Second Circuit in *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 Fed. 2d. 533 (C.A. 2, 1959), cert. den, 360 U.S. 912, 1959 conflicts squarely with the decisions of the first circuit in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F. 2d. 449 (1963), cert. den. 375 U.S. 820 (1964), and *Park Neponset Corporation* v. *Smith*, 258 F. 2d. 452 (1958). In the *International Shoe Machine Corp.* and *Park Neponset* cases, supra, the First Circuit held prior Government decrees inadmissible as a matter of law where the damage period in the subsequent private action commenced subsequent to the period during which the government decree found a conspiracy to exist. The Second Circuit's ruling in *Webster Rosewood*, supra is squarely contrary. In that action plaintiff operated a theatre in Rochester, New York beginning June 20, 1942 and claimed that by conspiracy it was deprived of a first neighborhood run. It offered in evidence a finding by Judge Knight in *United States v. Schine* (See 334 U.S. 117, 130) made as of May 19, 1942. In admitting the findings the District Court declared:

> "It seems impossible in the mass of cases brought by the government to curb monopoly to itemize every business entity that did suffer from such unlawful monopoly. If such particularization were necessary for the provisions of section 5 to operate, then the benefits intended by that section would be definitely curtailed by such reasoning. However, the better reasoning seems clear that such decrees are allowed as prima facie evidence of a general conspiracy with a necessary relation shown to all the local area and the particular business interest alleged to be harmed by the impact of the broad unlawful monopoly. *Emich v. General Motors, supra; Deluxe Theatre Corp. v. Balaban & Katz Corp.*, D. C. 95 F. Supp. 986.

The District Judge, however, found for the defendants on all the evidence. The Second Circuit in approving the District Court's interpretation of the statute, cited this Court's holding in *Theatre Enterprises*, supra:

> "Judge Foley held that this finding limited the 'prima facie estoppel' of the judgment of the Supreme Court under 16 of Title 15 U.S.C.A. to the period before May 19, 1942, and therefore to a period before the beginning of that for which the plaintiff demanded damages. There can be no doubt that this was a proper interpretation of the statute (Theatre Enterprises v. Paramount Film, etc. Co., 346 U.S. 537, 541, 543)."

Webster Rosewood Corp. v. Schine Chain

Theatres, Inc. (C.A. 2, 1959) 263 F. 2d. 533, 535.

In *Eagle Lion Studios v. Loew's, Inc.* (C.A. 2, 1957), 248 F. 2d. 438; aff'd by divided Court, without opinion, 358 U.S. 102, 3 L. Ed. 2d. 47, the Second Circuit affirmed the exclusion of *Paramount Case* findings by the District Court. Although the damage period of plaintiffs, who were independent distributors, commenced after 1945, the Second Circuit did not even discuss this as a grounds for exclusion of the Paramount findings. In affirming the exclusion of the Paramount findings by the District Court, the Second Circuit held that the Paramount Case did not address itself to the issue of whether the defendants Loew's, Inc., RKO Theatres, Inc. and RKO Film Booking Corp. had conspired to exclude the plaintiffs, who were independent distributors, from the opportunity of licensing their pictures on a competitive basis to the theatres of the defendant exhibitors in Metropolitan New York. Chief Judge Clark in a dissenting opinion, which except for the death of Judge Frank would have been the majority opinion, in stating that the Paramount findings should have been admitted stated: "*Paramount* findings pertain to the year 1945, but the plaintiffs showed by quite adequate evidence that the same conditions continued in the period 1946 through 1950."

The respondents contend that this Court would have held Paramount decrees to have been improperly admitted if resolution of that question had been necessary to the decision in *Theatre Enterprises*, supra, and that otherwise, it would not have said, "Indeed the relevancy of Paramount to the instant case is

slight." (Response to petition, page 11.) This assumption is groundless. This Court did not state in *Theatre Enterprises* that the relevance of Paramount to that action was slight because of the passage of time after 1945. The relevance of *Paramount* to the instant cases is not determined merely by the passage of time, but by the extent to which petitioners were affected by condemned Paramount acts and practices. Petitioner has pointed out on pages 30-31 of its petition for certiorari a number of the circumstances in Baltimore which made the relevance of the Paramount Case slight in *Theatre Enterprises*.

In 1954 the Fifth Circuit reached a different result than its decision in the instant cases, holding that the Paramount decrees were admissible in an action where plaintiff commenced operation of its theatre after the period covered by the *Paramount Case*. In *Tivoli Realty, Inc.* v. *Paramount Pictures, Inc.* (C.A. 5, 1954) 209 F. 2d. 41, the Fifth Circuit held that the Trial Court had committed prejudicial error in excluding the Paramount decrees and judgments. The Court's opinion does not indicate when the plaintiff's damage period commenced, but it appears in an earlier proceeding in the same case that plaintiff commenced to operate its theatre on September 26, 1947, after the period covered by the *Paramount Case*. *Interstate Circuit, Inc. et al* v. *Tivoli Realty Co.* (N.D. Texas, Dallas division, 1947) 75 F. Supp. 93. Although that decision was prior to this Court's ruling in *Theatre Enterprises*, supra, it cited the decision of the Fourth Circuit in *Theatre Enterprises*, supra, as authority for the admission of the Paramount decrees.

Contrary to the assertion of the respondents, the

Second Circuit in *Webster Rosewood*, supra, cited *Theatre Enterprises* as authority for admitting Government decrees in evidence where plaintiff commenced operation of its theatre after the period covered by the Government litigation. A number of District Courts have also cited Theatre Enterprises as authority for admitting the Paramount decrees, or portions thereof, in evidence where plaintiff's damage period commenced after 1945. *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.* (N.D. Pa.) 168 F. Supp. 553, 559. *New Amusements v. Knoxtenn Theatres, Inc.* (E.D. Tenn. 1960).

5. The Result Reached in The Instant Cases, And the Rulings Which Led Up To It, Are In Conflict With The Decisions of This Court and the Statutory Court in the Paramount Case.

Unquestionably there was in existence in the City of Atlanta up to 1945 a local counterpart of the national conspiracy condemned in the Paramount Case (Petition for Certiorari, pages 14-16). Respondent's Response does not appear to deny this. At that time petitioners theatres were in operation and playing on subsequent run. The evidence shows the continuance of this conspiracy with its uniform structure of runs and clearance, its split of first run product between the defendant exhibitors, and its exclusion of independent exhibitors, including petitioners, from the first-run field, after 1945 and during the damage period (Petition for Certiorari, page 17-26). The affiliation of the defendant exhibitors Wilby-Service corporation and Atlanta Enterprises, Inc. with Paramount Pictures, Inc. continued up to 1950, and after 1950 those exhibitors became affiliated with American

Broadcasting-Paramount Pictures, Inc., the largest circuit operator in the country. Evans Amusement Corporation continued to be affiliated with the defendant Loew's, Inc. up to 1959. The respondent distributors continued to serve their product to the same downtown theatres of these defendant exhibitors after 1945 and during the damage period, and would not even negotiate or discuss terms for first-run product with defendant exhibitors including petitioners. Respondents point out in their response that the 1945 clearances were reduced during 1952-1961 (response brief, page 13). However, the clearances continued to be uniform during the damage period, and continued to exclude petitioners and other independent exhibitors from the first-run field monopolized by the defendant exhibitors (See petition, pages 17-26). In this regard it is significant to note that the Trial Court allowed Count 2 of each petitioner's complaint which charged a local conspiracy, to go to the jury.

Respondents point out that, except for the Paramount decrees, petitioners offered the same evidence on Count 2 of the complaint, as they offered on Count 1, and state that the jury finding for the defendants on Count 2 affirmatively established the validity of the Atlanta runs and clearances from 1952-61 (Respondent's Response to Petition, p. 13). The Fifth Circuit in its opinion, stated in this regard that they were "... not convinced that the jury's finding's on separate counts need be completely consistant." Also, in any action where petitioners seeks reversal solely because of the exclusion of evidence, it naturally follows that either the District Court or the Jury has found against petitioner on the basis of the evidence actually admitted. Thus respondents are in effect

claiming that the exclusion of evidence prior to the commencement of petitioner's damage period cannot be prejudicial error. This contention is clearly without merit. See *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 790, 797. *Bausch Machine Tool Co.* v. *Aluminum Co. of America*, 72 F. 2d.(C.A. 2), 1934 cert. den., 293 U.S. 589.

For the reasons stated in this reply brief and in the petition for certiorari, therefore, we urge that this Court issue its writ of certiorari in order to review the judgment below.

Respectfully submitted,

EDWARD S. O'NEILL
SWIFT TYLER
JOHN TYLER
W. BRADLEY RYAN
BARRY R. McDONOUGH